SUBJECT INDEX

PAGE

Preliminary statement 1

1. Reply on the question of incitement 3

2. Reply on the question of clear and present danger 9

3. Reply on the question of the meaning of the word "organize" 12

4. Reply on discussion of the facts 15

5. Reply on the question of "overt acts" 30

6. Reply on the question of the F.B.I. report and motion for mistrial 32

Conclusion 34

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Dennis case, 341 U. S. 494	1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 25, 30
Fox v. Washington, 236 U. S. 273	6
Gitlow v. New York, 268 U. S. 652	5
Offutt v. United States, 348 U. S. 11	34
Remmer v. United States, 347 U. S. 227	33
Schneiderman v. United States, 320 U. S. 118	24, 27
United States v. Flynn, 216 F. 2d 354	12
United States v. Frankfeld, 198 F. 2d 679	6
United States v. Mesarosh, 223 F. 2d 449	6, 12

STATUTE

United States Constitution, First Amendment 3, 4, 6, 7, 8, 11, 16, 19, 29

TEXTBOOKS

Chafee, Free Speech in the United States (1920), pp. 20, 201 4

Chafee, Free Speech in the United States (1948), p. 163 14

4 Eliot's Debates (1836), pp. 546-80 4

58 Harvard Law Review (1944-45), pp. 226, 815, Hurst, Treason in the United States 4

Howell's State Trials (Lond. 1817), Vols. XXII-XXIII 4

Miller, Crisis in Freedom (1951), p. 85 4

IN THE

Supreme Court of the United States

October Term, 1955

No. 308

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES.

Preliminary Statement.

The plain purport of respondent's brief is to obtain, without a hearing by this Court, a substantial revision of the principles enunciated by this Court in *Dennis* and to facilitate prosecutions under the Smith Act unencumbered by fundamental restrictions of the Constitution. Respon-

dent maintains that the Smith Act punishes all contemplated advocacy and teaching of proscribed doctrines with seditious intent, even if such advocacy and teaching be unaccompanied by any incitement or call to action. Respondent urges that the Smith Act can be constitutionally applied to any accused without any finding of "clear and present danger" by the trial court; that "clear and present danger" can be equated solely with strained "world conditions" and that such finding can initially be made by any appellate court. It is argued that proof of membership and officership in the Communist Party with lawful activities therein is sufficient to establish each petitioner's connection with the conspiracy charged in the indictment herein as well as the specific intent of each of the petitioners. Even admittedly lawful acts of speech and assembly within the Communist Party, respondent maintains, are "overt acts" of seditious conduct in furtherance of the conspiracy charged in the indictment. It is argued, without substantiation, that Congress intended that the "organize" clause of the Smith Act should apply to even the recruitment of a single member into the Communist Party, thus effectively foreclosing the bar of the statute of limitations from any charge of conspiracy to organize the Party as a vehicle to advocate and teach proscribed doctrines. It is also urged that all "organs of government" may publicly comment on the specific issues of a pending Smith Act trial to the prejudice of an accused without substantial relief by the courts. Thus, respondent's 72-page brief

emphasizes the profound significance of the questions presented.

The reply which follows is in the order originally adopted in the petition for writ of certiorari.

1. Reply on the Question of Incitement (Pet. pp. 9-10, 21-35; Resp. Br. pp. 32-60).

Respondent contends that this Court's opinions in *Dennis* show that the function of a charge with respect to language of incitement in a prosecution under the Smith Act is simply to draw a clear distinction between "discussion" protected by the First Amendment and "advocacy" of forcible overthrow of the Government which Congress may validly proscribe. It as argued, that this Court "has never suggested that the distinction must be phrased in terms of incitement" (Resp. Br. p. 55). Respondent concludes, therefore, that the distinction is sufficiently made, and was made below, by an instruction that the petitioners could only be convicted if they conspired to advocate the forcible overthrow of the Government "with the specific intent to cause or bring about such overthrow as speedily as circumstances would permit" (Resp. Br. p. 55).

Contrary to the view of respondent, this Court has never held, it is respectfully submitted, that a statute may validly proscribe all advocacy of proscribed doctrines, so long as discussion of those doctrines is left unimpaired. That the Constitution requires a more narrow construction of the Smith Act than is now contended for by respondent

is evident from chief Justice Vinson's opinion in *Dennis*, where the trial court's instruction that the Smith Act condemns only advocacy in language of incitement to action, was held to state the facts "essential" to establish the substantive crime involved in the conspiracy charge. 341 U. S. 494, 511-12.[1] See also, the concurring opinion of Justice Frankfurter, 341 U. S. 494, 518, 533-39, 644-46, 549. If the Smith Act simply draws a line between discussion of ideas protected by the First Amendment and any advocacy of the forcible overthrow of the Government, then indeed a "new statute" different from that applied in *Dennis* is here involved, the constitutionality and application of which require review by this Court. The view of respondent that the advocacy and teaching of the principles of Marxism-Leninism are proscribed by the Smith Act, even if unaccompanied by any call to action, so long as the advocate or teacher is found by the jury to possess seditious intent is reminiscent of ancient and discarded doctrines of seditious conspiracy and constructive treason. Chaffee, *Free Speech in the United States* (1920), pp. 20, 201; Hurst, *Treason in the United States*, 58 Harv. L. Rev. 226, 815 (1944-45); 4 Elliot's Debates (1836), pp. 546-80; Howell's *State Trials* (Lond. 1817), Vols. XXII-XXIII; Miller, *Crisis in Freedom* (1951), p. 85.

---

[1]The approved instruction stated that the law condemned "the teaching and advocacy of action . . . . by language reasonably and ordinarily calculated to incite persons to such action". This *addition* of the requirement of incitement to that of advocacy is certainly something more than the drawing of a line between discussion and advocacy. Just as there can be discussion without advocacy, so there can be advocacy without incitement. It would seem clear accordingly that incitement brings in a new, not simply a clarifying element.

In the Court below, respondent argued that the numerous holdings of this Court which emphasized the importance of distinguishing between advocacy of doctrines, and advocacy of doctrines in language of incitement to action, were *"oibter dicta"* (App. Br. p. 332). The same argument is now more guardedly couched in respondent's statement that this Court "has never suggested," *in a Smith Act prosecution,* "that the distinction must be phrased in terms of incitement" (Resp. Br. p. 55). This argument suggests the concept that the line is to be drawn at a different point in a Smith Act case than in other types of cases. The written record is quite to the contrary. Each of the judges who expressed any opinion in *Dennis* from its inception to its conclusion, emphasized the requirement of an instruction in terms of incitement (Pet. pp. 22-23). Chief Justice Vinson thought it was "essential" (p. 512); Justice Frankfurter held that the charge of the trial judge "had properly explained to the jury what it is that the Smith Act condemns" (p. 518); Justice Jackson stated that "direct incitement by speech or writing can be made a crime" (p. 571). There was not a single disagreement with the view of concurring Judge Chase in the Court of Appeals, who emphasized the specific construction of the statute by the trial judge with respect to the issue of incitement to action, and stated that this construction of the Act was "demanded" in view of the decision of this Court in *Gitlow v. New York,* 268 U. S. 652, 664, 665 and the requirements of the Constitution. 183 F. 2d 201, 235. To assert, as does respondent, that this Court has "never suggested" that in a Smith Act case the distinction between constitutionally protected speech and speech which Congress may validly proscribe must be phrased in terms of incitement.

is simply to argue that a body of decisions by this Court which covers a period of at least four decades, from *Fox v. Washington*, 236 U. S. 273 to the decision in *Dennis*, are inapplicable in a Smith Act case. See Justice Frankfurter's review of the decisions, 341 U. S. 494, 533-39.[2] This issue as to whether the First Amendment should be given a special interpretation in Smith Act cases, should be reviewed by this Court.[3]

Respondent's attempt to avoid the issue by asserting that Judge Medina's instructions in *Dennis* are not required to be used "verbatim" is fruitless in the light of the undisputed record below (Pet. Br. p. 21). The courts

---

[2]Clearly, the overwhelming majority of the lower courts has interpreted *Dennis* as requiring an "incitement" instruction in addition to an instruction on seditious intent. In *United States v. Mesarosh*, 223 F. 2d 449 (C. A. 3, 1955), District Judge March, the trial judge, gave such instruction, and the majority and minority in the appellate court differed only on the sufficiency of the evidence to establish a conspiracy to advocate in language of incitement to action. See, the opinion of Hastie, J., dissenting, pp. 459-66. Here the instruction was not even given, and the record is barren of any evidence to support such a finding. Counsel is advised that a petition for writ of certiorari in the *Mesarosh* case will soon be filed in this Court. District Judge Dimock in *United States v. Flynn* in the second New York Smith Act prosecution emphasized the instruction. District Judge Chesnut gave the instruction in *United States v. Frankfeld*, the Baltimore prosecution, and Chief Judge Parker in the appellate court noted the significance of the instruction in his opinion on appeal. 198 F. 2d 679, 687 (C. A. 4, 1952). The instruction was given by District Judge Picard in the trial in Detroit; by District Judge Harper in the trial in St. Louis; and by District Judge Breitenstein in the trial in Denver. As the respondent itself notes, the two trial judges in Hawaii and Seattle, respectively, both followed District Judge Mathes, the trial judge here, in subsequent trials, using the instructions of Judge Mathes almost verbatim (Resp. Br. p. 57, note 25).

[3]Such a review would lead to consideration of the question as to whether it is either constitutionally permissible or practicably possible to apply the First Amendment differently to different groups.

below made it clear beyond cavil that any advocacy of the forcible overthrow of the Government with seditious intent was a crime under the Smith Act, "whether it is language of incitement or not" (Pet. Br. pp. 9-10). In fact, respondent here does not predicate its argument on the view that any instruction on incitement or call to action was given below; its argument is that none need be given if an instruction on intent is rendered to the jury. Thus, the respondent here is in complete accord with the statement of the trial court below that an accused is guilty of a violation of the Smith Act if he "get out here on the front steps of the Federal Building and in the best of well modulated tones, almost timid, could make this speech to be reproduced on a recorder and played to the jury and the jury might find he advocated the overthrow of the government by force and violence, and he advocated it in certain language and in a certain tone of voice which you and I might consider mild, very mild. The jury might decide that he did it with the intent to accomplish the overthrow of the government of the United States by force and violence as speedily as circumstances permit" [R. 12442-3]. This Court in *Dennis* did not countenance such construction, and review is necessary to make clear whether such breach in the First Amendment by the courts below is consistent with the guarantee of Freedom which that amendment contains. Respondent mistakenly poses the issue as one between *intent* to use language of incitement, and *intent* to forcibly overthrow as speedily as circumstances permit (Resp. Br. p. 53). The real issue is whether the Smith Act punishes an *agreement* to advocate the forcible overthrow of Government, unless the *agreement* is one to use language of incitement. The question is not one of subjective intent; it is one of proof

of an objective agreement, whether by circumstantial evidence or otherwise.[4]

In addition, respondent, by its own arguments on the question presented here, makes clear the need for review by this Court. If the function of a charge with respect to language of incitement is "to draw a clear distinction" between speech which is and is not protected under the Constitution (Pet. Br. p. 27), all the more reason why the charge should have been given. If this Court has "never suggested that the distinction must be phrased in terms of incitement" (Resp. Br. p. 55), then clearly this Court should review a holding that a distinction less sharply drawn is adequate to satisfy the requirements of the Constitution.

In the light of the fact that *Dennis* could not have held the incitement instruction unnecessary, it having been given in that case, there is presented here at the very least a construction of this statute never passed on by this Court. This construction, it is apparent even from respondent's brief, raises fundamental First Amendment problems which should be reviewed by this Court. While the portion of the trial court's instructions (Br. pp. 56-57) may adequately distinguish, accordingly to respondent, between a conspiracy "to advocate rather than to express ideas" (Resp. Br. pp. 56-57), still this Court must determine whether in a Smith Act prosecution the jury must not also be instructed that the Smith Act punishes only

---

[4]The respondent's contention (p. 58) that the petitioners' argument relates to the imminence of the overthrow misses the point completely. The question is not here involved as to when the alleged agreement may be consummated; rather it is whether the agreement if and when consummated will include incitement to action.

a conspiracy to advocate and teach in language of incitement to action and as a rule or principle of action (Pet. pp. 27-29).

Moreover, although respondent declines to accept the premises of the opinion of the Court of Appeals (Resp. Br. pp. 58-60), respondent cannot dispute that the affirmance of the trial court's rulings was fundamentally founded on the view that the 1948 version of the Criminal Code had effected "a drastic change in the issues of a Smith Act prosecution" (Resp. Br. p. 59). In actuality even the Court below did not purport to rely on *Dennis* or prior decisions of this Court in support of the position for which respondent now contends. The Court below held, in effect, that *Dennis* was "as of yesterday"; that a "new statute" now exists; that the conspiracy charged is now the "standard conspiracy"; and that even if the planned advocacy and teaching are protected by the First Amendment, still the "new" Smith Act could be constitutionally applied. Such a decision and judgment (concededly erroneous according to respondent), if permitted to stand, will become operative law not only for the Ninth Circuit, but may well be adopted in other jurisdictions. The resultant confusion in the administration of the Act and the possibilities of substantial injury are so manifest as to emphasize the importance for granting review herein.

2. Reply on the Question of Clear and Present Danger (Pet. pp. 6-9, 35-40; Resp. Br. pp. 60-64).

It is clear (Resp. Br. p. 60) that respondent cannot sustain the view of the trial court that the mere existence of the prescribed specific intent is equivalent to the existence of a clear and present danger (Pet. Br. pp. 36-38). There is also no dispute that, because of the trial court's

view, no consideration was given to the questions as to whether or not, on the evidence, the petitioners had the power to bring about any attempt to forcibly overthrow the Government or whether the nature of their activities indicated any such purpose or danger (Pet. Br. pp. 38-40).

Respondent is reduced, therefore, to making the following argument: In Smith Act prosecutions, neither the jury nor the trial judge before submission of the evidence to the jury, are required to make any finding of clear and present danger, formal or otherwise. The finding may be made initially in the Court of Appeals, or initially by this Court. The finding by the Court of Appeals, according to respondent, that "world conditions at the date of [the Dennis] trial had not changed for the better when trial in the instant case was had" (Resp. Br. p. 63) was a sufficient finding of "clear and present danger."[5] Indeed, respondent states, "a contrary conclusion would have warranted review by this Court" (Resp. Br. p. 63).

It is submitted that these admissions and arguments are sufficient in themselves to call for review by this Court. In *Dennis*, this Court held that the question of the existence of a clear and present danger need not be submitted to the jury, but that the court "must examine

---

[5]The Appellate Court specifically disavows the intention of making such a finding. First, it says that the jury determined the issue: "The instructions of the trial court clearly show that, if the jury convicted under the rules of law there laid down they would have necessarily found a clear and present danger existed." (Appendix A to Petition p. 30); Second that the function is one exclusively for the Supreme Court: "It may be that prospects of larger policy or changes in the look of international affairs should be viewed to fix the acts proved here in perspective. But, as we understand it, as a lower federal court that is not our function." (Appendix A to Petition p. 41).

judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction." 341 U. S. 494, 515. This Court gave no indication that the trial judge could abdicate this function, and refuse to consider such relevant considerations as the power of the accused to bring about the evil or the nature of their activities. Nor is it apparent, how, without such initial finding, an appellate court on a cold record could make such evidentiary findings (Pet. Br. p. 40). Such findings require an evaluation of the evidence which can only be made by a Court which saw and heard the witnesses, and was therefore in a position to determine questions of credibility and of the weight of the evidence.

Moreover, respondent equates strained "world conditions with "clear and present danger" (Resp. Br. p. 62). This is contrary to the ruling in *Dennis* and substantially undermines the protective provisions of the First Amendment (Pet. Br. pp. 38-40). Dennis holds that the state of world conditions is one element of clear and present danger, but it also declares that equally important issues are the power of the particular accused to bring about an attempted forcible overthrow of the Government and the nature of their activities directed to such an end. This Court has never held that the exercise of constitutionally protected freedoms may be abridged from day to day solely on the basis of political conditions. On the contrary, the gravity of the evil must be "discounted by its improbability," and "where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution." 341 U. S. 494, 510, 516. The courts

below, and respondent here, treated these fundamental criteria as mere "words" (Pet. Br. p. 11, note 6). The trial court ruled that neither judge nor jury need consider whether the evidence established that the petitioners had the power to bring about the evil at which the law is directed or whether the nature of petitioners' activities was such as to create a clear and present danger. This Court should not permit such drastic obliteration of a rule of law intended to delimit the areas of personal freedom and the power of the State.

3. Reply on the Question of the Meaning of the Word "Organize" (Pet. pp. 10-11, 41-46; Resp. Br. pp. 64-68).

Respondent does not dispute that the trial courts are in conflict with respect to the meaning of the word "organize" as used in the Smith Act. In the second and third circuits, charges of conspiracy to organize have been dismissed as barred by the statute of limitations. *United States v. Flynn,* 216 F. 2d 354, 358 (C. A. 2, 1954); *United States v. Mesarosh,* 223 F. 2d 449, 465 (C. A. 3, 1955). It follows, therefore, that in certain federal jurisdictions neither a charge of conspiracy to organize the Communist Party as a proscribed organization, nor the substantive charge, can be sustained. In other jurisdictions, a contrary view obtains and prosecutions may be brought. Such substantial conflict in the administration of the statute should be resolved by this Court, especially in the light of the conceded novelty of the issue as applied to the Smith Act.

Respondent has been unable to produce one decision which supports the interpretation and construction of the statute by the courts below. It is also unable to distinguish the unbroken line of decisions which are opposed

to the interpretation for which it contends (Pet. Br. pp. 41-43). So far, therefore, as the applicable law is concerned, the construction of the statute by the courts below is clearly erroneous.

Respondent's argument is bottomed upon an alleged Congressional intent unsupported by any affirmative evidence thereof. The contentions in support of this argument are merely speculative and conjectural, and lacking in logic. It is asserted that Congress must have enacted the "organizing" section of the Smith Act "to reach the leaders of such groups" as the Communist Party, and that the construction for which petitioners contend would mean that the "organize" clause of the Act could never have been "applied to the leaders of the Communist Party of the United States which was first organized long before 1940" (Resp. Br. p. 65).[6] In the first place, this Court cannot assume that the Smith Act was passed to attaint the Communist Party. In the second place, the interpretation of the word "organize" by the courts below would encompass any member of the Party, not only its "leaders," as witness the prosecution herein.[7] In the third place, if the Smith Act was intended to be applied to the members and officers of the Communist Party, other provisions of the Act which condemn "advocacy and teach-

---

[6]Apparently the concept that the Smith Act was intended to apply to the Communist Party did not occur to the Attorney General's office unil 1948, when the Dennis Indictment was filed, a few days less than three years after the reconstitution of the Party.

[7]Respondent refers to the organize provision as the "leadership" clause. There is nothing either in the language or history of the act supporting this definition. Moreover the trial judge's instructions did not define the terms in the manner Respondent argues is correct. Under the judge's instructions, recruiting of a single member, by the humblest member of the Communist Party constitutes organizing.

ing," "distribution of literature" and "knowing membership" were made available by Congress. No legislative purpose could therefore be frustrated in treating the "organizing" section of the Smith Act as applicable only to organizations which were formed after the passage of the act and allegedly advocated proscribed doctrines, subject only to the bar of the statute of limitations.

Respondent urges this Court to ignore the decisions of the California courts on the precise issue here presented (Resp. Br. pp. 65-68). It argues from a single colloquy in 1935 (not 1940) (Resp. Br. p. 67, note 6), that Congress intended to model the Smith Act after the New York criminal anarchy statute and that New York "has never given the narrow interpretation urged here by petitioners" (Resp. Br. p. 67). Respondent overlooks the fact that the issue never arose in New York. It is plain from the résumé by Justice Jackson in *Dennis*, 341 U. S. 494, 562, note 2, that the initial criminal anarchy statutes of 1909 were the prototypes of the criminal syndicalism statutes of 1917-19, essentially the same in language, and that these state statutes served as a model for the Smith Act. The language of the California Criminal Syndicalism Act and the Smith Act is markedly identical (Pet. Br. pp. 42-43).[8] Thus, the construction of the law by the California courts is apposite and reflective of Congressional intent.

---

[8]Professor Chafee observes that the criminal syndicalism statutes take their "origin from New York Anarchy Act of 1902." *Free Speech in the United States* (1948), p. 163. "In the legislative sessions which followed the Armistice (1918), emergency laws against new crimes labeled as anarchy and criminal syndicalism were adopted by state after state with a striking coincidence of phraseology. . . . About one-third of the states have applied the statutory scheme to the new crime of criminal syndicalism." *supra*, pp. 143, 165.

Such a construction of the law in California hardly turned out to be "absurd" or "frustrating" as respondent prognosticates for the Act herein (Resp. Br. p. 65). Although the California courts held that the "organizing" section of the law could not be applied in 1919 to the I.W.W., organized many years before, still other provisions of the law were persistently used against its officers and members. Justice Jackson stated in *Dennis* (*supra*, note 2): "In California alone, 531 indictments were returned and 164 persons convicted."

There appears to be no foundation in law or legislative history for the broad construction of the Act by the courts below, which raises questions of serious constitutional import (Pet. Br. pp. 44-46). The trial courts are in conflict and the administration of the Act diverse. The question would appear to be ripe for this Court's adjudication.

4. Reply on Discussion of the Facts (Pet. pp. 6-18, 47-76; Resp. Br. pp. 3-40, 46-50).

The respondent does not dispute the accuracy of the statment of facts in the petition. That statement together with the respondent's own summary, in the Court below, of the evidence with respect to each individual petitioner (Appendix C to petition) and the charts graphically delineating the crucial evidence (or lack thereof) relating to each individual petitioner (Appendix E to petition) stand unchallenged.

The respondent does not quarrel with the proposition that the connection of each petitioner with the alleged conspiracy and his or her specific intent can be established only by the evidence directly related to each individual petitioner. In the entire 72-page reply brief no

attempt is made to state or analyze the evidence as to each petitioner separately. From the undisputed facts as set forth in the petition, it is clear that the convictions here can be sustained only upon the premise that membership, officership and innocent or protected activity in the Communist Party constitute sufficient evidence of an individual's connection with a conspiracy to advocate the forceful overthrow of our Government and of his intent to achieve that objective as speedily as possible. This premise presents serious First Amendment problems which the respondent avoids in its brief.

This avoidance is accomplished by a process of selecting some evidence as to each of the petitioners, third party declarations to which none of the petitioners are in any way connected, and quotations from writings not tied in to any petitioner,[9] and then arranging them in a sequence, calculated to establish the respondent's thesis.

(a) Pages 5 to 15 of the respondents' brief are devoted to a summation of the positions held by petitioners in the Communist Party. They establish connection with the Communist Party—not with the conspiracy charged. Insofar as the Communist Party is concerned it is not the conspiracy charged; its organization and utilization as a vehicle for the proscribed activity is what the indictment alleges.

In *Dennis* this Court did not hold that membership and activity in the Communist Party was proof of a conspiracy which could be punished under the Smith Act. To the contrary, it predicated its entire application of

---

[9]Petitioners are treated as having adopted as their own quotations from books they are never shown to have read or used in any manner.

the Act upon the proposition that the petitioners in that case engaged in the conspiracy charged by planning and intending to organize and utilize the Communist Party for the purpose of engaging in the forbidden advocacy. In this case the Government, while relying upon *Dennis*, seeks to justify the convictions upon the premise that it is the Communist Party which is the conspiracy, with membership and activity in the Communist Party, no matter how lawful that activity may be, constituting proof of participation in the illegal conspiracy. The reliance on and presentation in great detail of the legal activities of petitioners within the Communist Party is itself an indication of the infirmity of the proof on the issue of advocacy of force and violence.

Moreover, the respondent's conclusion that these petitioners were the dominant leaders of the California Party is unsupported by the record. For example, the highest office ever held by the petitioner Fox was City Section Organizer, by the petitioner Kusnitz, City Division Organizational Secretary, and by petitioner Steinberg, County Legislative Director; only four out of the eleven petitioners here involved were shown to have ever held any state office.[10]

In the *Dennis* case this Court upheld the constitutionality of the Smith Act as applied to the facts found by the Court of Appeals. The record of this case is so different from the facts found in *Dennis* that the constitutional questions arising out of the application of the statute to the facts of this case can in no wise be con-

---

[10]Compare this with the *Dennis* case where all the defendants were jointly members of the top national governing body of the Party.

sidered as having been determined by *Dennis*. This is rendered apparent from the brief of the respondent itself when that brief is analyzed. Its assertion that the facts of this case are substantially identical with those in *Dennis* is not true.[11] In *Dennis* the finding was that the defendants acting jointly as a group reconstituted the Communist Party as an instrumentality which they controlled for the purpose of advocating the overthrow of the Government of the United States by force and violence. In this case the only common denominator among petitioners is membership in the Communist Party. There is no evidence showing an agreement among them to form or utilize the Communist Party as an instrumentality for the forbidden objective. The respondent is actually urging that all Communists (or perhaps Communist officer holders) may be found guilty of participation in the Smith Act conspiracy with the requisite intent regardless of their own conduct as such members or officers.

(b) It is alleged that the Communist Party at one stage characterized World War II as an unjust war having imperialist objectives (Resp. Br. p. 7, note 4). Reference is then made to Exhibit 28, "The History

---

[11]Acceptance of the Government's view of the facts requires the finding by this Court, in the process of a ruling on certiorari, of facts contrary to the holding of the Court of Appeals, which said "Defendants themselves say that there were significant legal and factual differences between the situation in the *Dennis* case and the case at bar. We agree" (Appendix H to Pet. p. 7). The character of these differences is rendered apparent by the finding in the *Dennis* case of specific facts with respect to an agreement to convert the Communist Party into an instrument for illegal advocacy, whereas in this case the only evidence specifically referred to by the Court below is the holding of a "Lenin Memorial meeting" to "demonstrate for the Bill of Rights" and "protest against the current trial in New York of twelve national leaders of the Party". (Appendix A to Pet. p. 23).

of the CPSU," which sets forth the slogan raised in Russia in 1917 of "converting the imperialist war into civil war." From the characterization of the war as imperialist by the Communist Party, the conclusion is drawn that the Communist Party of the United States in 1941 supported the objective of converting the imperialist war into a civil war. Thus by tying together a position taken by the Communist Party of the United States in 1941 with the 1917 quotation, the respondent draws a conclusion with respect to the position of the Communist Party directly contrary to that which is revealed by its own conduct.

By this process of attributing to the petitioners statements which appeared in books circulated by the Communist Party, despite the uncontradicted evidence of conduct of petitioners inconsistent therewith, an artificial picture is created by the respondent. This imposition of responsibility for the contents of books to those who read and distribute them presents a serious question of freedom of speech and press, under the First Amendment.

(c) At pages 16 to 18 of the brief the respondent argues that the evidence of the duties of *petitioner Yates and separate petitioner Schneiderman* as state officials of the Party prove the joint control of all petitioners over the California Communist Party. First it is considered that *several* of the petitioners as top state officials rendered decisions "binding on lower bodies"; then, it is argued, it is thus established that *all* of the petitioners, including those holding no state position and who were allegedly bound by the decisions made by the state officials, are the dominant controlling figures of the State Party.

More important than this *non sequitur* is the fact that there is no showing of any common agreement to exert this dominance towards the illegal end charged. The respondent cites as an instance of "iron control" by petitioners the "purging of members who failed to follow the party line orders of the conspirators." Respondent can only be referring to persons expelled because they took the position that the replacement of the capitalist system by socialism was the issue then facing the American people. The Communist Party program and policy was opposed to this view because this program did not have majority support of the American people [Ex. 639; R. 44, 56, 4674-4708; App. Item 83, pp. 334-343; R. 4376-81]. The record shows that these expulsions were consummated through a democratic trial by and decision of a party membership meeting, and the expulsions themselves indicate that the Communist Party was following a policy of excluding from its ranks those who were advocating a program to be achieved by means other than the attaining of majority support. To permit such evidence to be utilized to prove a conspiracy by Communists to advocate the overthrow of the Government by force and violence is tantamount to taking the position that anything that Communists do, even opposition to force and violence, is proof of their participation in a conspiracy to violate the Smith Act. Such proposed indirect outlawry of the Communist Party and its members raises serious constitutional problems which this Court has never considered.

(d) Typical of the respondent's efforts to surmount the insufficiency of evidence here is the arbitrary distortion (p. 19) that the managing editor of the *People's World* was selected by the Central Committee of the

Party "in adherence" to the Communist International requirement of selection of editors "who have proven their loyalty to the cause of the proletarian revolution" (A 566). There was evidence of the selection of said managing editor but there was not a single word to indicate that this was done "in adherence" to the asserted principle of the Communist International. The respondent simply lifts out of context a quotation from a book written by Lenin in 1918 with respect to Russia and asserts that the appointment was "in adherence" to the "principles" set forth in the quotation. By this device of selection of quotations, unhampered by considerations of evidentiary foundation, the respondent artificially attaches an evil motive to a legal act thereby converting it into proof of participation in the conspiracy charged.

(e) At page 20 of the brief the respondent, by reference to "This History of the CPSU" [Ex. 28], attributes to the *People's World* the roles of advocating violent revolution utterly disregarding the actual content of that newspaper, which admittedly never contained any advocacy of violence.

(f) At pages 20 and 21 of the brief the importance of the *People's World* as a "guide to action" and as a basis for education in the application of Marxism-Leninism is stressed. It would appear reasonable that if, as undeniably is the case here, the paper urged only action within the framework of our constitutional system, this would be some evidence tending to negate the existence of the conspiracy. Respondent by some strange logic turns this into its opposite.

(g) The technique followed by the Government is further illustrated by its treatment of the "concentration

policy" of the Communist Party (pp. 22-23). Concededly, the Party sought to recruit as many members as possible from among workers in the basic industries and concentrated upon this as an objective. To establish the motive of petitioners who allegedly supported this concentration policy the respondent turns to two sources: (1) what was said at a 1944 national training school at which none of the petitioners was present and with respect to which none of them was shown to have any knowledge [A 58-60, Tr. 2140, *set seq.*; (2) to a quotation from "The History of the CPSU" [Ex. 28], to the effect that key transportation and communication facilities were the first properties occupied in the 1917 revolution in Russia [A 497, Ex. 28, p. 208; see Resp. Br. p. 23]. The only evidence as to the motives of any of these petitioners in engaging in the concentration policy is completely ignored. That evidence indicates that the Party and the petitioners who did participate in the concentration policy sought merely to recruit workers in a workers organization. The sole object of the concentration policy was "to encourage the workers in these industries to come forward and take leading roles in all respects of the progressive-democratic movement, in election campaigns, in fights around issues in the community" [R. 10429, 11084]. The issue as to whether these petitioners are to be bound by their own conduct or whether they shall be held accountable for passages selected by the prosecution from books and the evidence of informers as to incidents in the distant past with which none of the petitioners were associated presents a crucial question with relation to the right of association. For if a member of an organization may have his connection with a conspiracy and illegal intent proved by selected passages in books or

other writings distributed by an organization to which he belongs or by whatever anybody says during any meeting or other gathering of the organization, no matter how remote in time and relationship, and no matter how lacking in knowledge the individual is with respect to these incidents, then association indeed becomes a hazardous pursuit.

(h) The respondent's position with respect to the "underground structure" established by the Communist Party is even more extreme (pp. 24-26). In a footnote at page 24 the Government refers to the facts of other cases not a part of the record of this case and relies upon those facts as binding on these petitioners. To establish the purpose of the "underground structure" the respondent quotes from Gov't. Ex. 504, a book written by Lenin in 1918 without showing any relationship between the petitioners and the language quoted [A 566, see also A 521, 529-33; see Resp. Br. pp. 23-4]. Ignored is the only evidence relating to any of these petitioners that any secrecy which was pursued was intended to protect Communist Party members from loss of jobs, from physical attacks and from other harassment and persecution [R. 5901, 5911-28; Exs. FX, GC and DA; R. 5893, R. 10221-34, 10740-81, 10491-96, 11075-80; App. Item 76, pp. 290-93; R. 4471, R. 1332, R. 11069-71]. Thus again the language in books written during different periods and in other countries is attributed to petitioners although it is not shown that they have adopted the language of those books as specifically applicable to current conditions in the United States and despite the fact that the only evidence of the conduct of the petitioners is inconsistent with their adoption of that language.

(i). Reference is made (pp. 27-30) by the Government to the 1945 reconstitution of the Communist Party. However, it ignores the constitution of the Communist Party which specifically disavows the advocacy of the overthrow of the Government by force and violence. In *Dennis* a witness testified that the defendants in that case used that language as Aesopian language for the purpose of concealing their true objective. There was no such witness here. There was no evidence in this case that the petitioners or any of them understood the constitution of the Communist Party and particularly its disavowal of advocacy of force and violence as not meaning what it plainly says. Reliance is placed upon the statement of the petitioner Schneiderman at conventions to the effect that the party was going back to the fundamentals of Marxism-Leninism. This is the same Schneiderman as to whom this Court had held that his advocacy of Marxism-Leninism was not proof of advocacy of the overthrow of the government of the United States by force and violence. *Schneiderman v. United States,* 320 U. S. 118. Yet his statements of *Marxism-Leninism* now are applied to him and to other petitioners as establishing their advocacy of the violent overthrow of our Government.

(j) From pages 30-40 the respondent discusses Communist Party classes with respect to which two groups of outlines were introduced into evidence [Exs. 39, 613 and 6263, all practically identical, and Exs. 163, 450, 201, 213, 214].

It is conceded that the second group of outlines, which includes the only ones that any petitioners prepared, all contain disavowals of force and violence. These statements are brushed off by the assertion that they were prepared after the *Dennis* indictment. Here the Government as it does throughout its brief seeks to convert the legal to the illegal by the imputation of an evil motive. By this reasoning any disavowal of advocacy of force and violence by a Communist after the *Dennis* indictment is of no avail; proof of membership in the Party then would constitute unrebuttable proof of participation in the conspiracy charged.

But this attempt to convert into its opposite evidence favorable to petitioner becomes all the more transparent when it is noted that the first set of outlines, prepared before the *Dennis* indictment specifically state opposition to any attempt by a minority to win power and set forth the objective of the Communist Party as "the establishment of socialism by the free choice of a majority of the American people" [Ex. 626; R. 1788-92]. The outline goes on to say:

> "In the struggle for the program for peace and democracy, jobs and security, favorable conditions are created for the masses of our people to recognize, on the basis of their own experiences, the need for the eventual reorganization of society along socialist lines." [Ex. 626, p. 34.]

The respondent disposes of these facts by ignoring them; ignoring also that there was no proof that these petitioners adopted any other view as their own.

(k) In the place of these statements appearing in the outline—and it must be remembered that the respondent itself relies on the outlines as authoritative[12]—for ten pages (30-40) the Government interlaces third party declarations with selected quotations from some of the books referred to in the outlines.[13] The contents of the outlines themselves are conveniently disregarded. The outlines all include numerous quotations from the books listed—but *not a single one* of these quotations is referred to by the respondent.

Again and again the books and outlines introduced by the Government [Ex. 626, Tr. 1719] set forth warnings that the means of achieving socialism must be examined historically and depends upon concrete political conditions existing at the time in question in the country involved.[14] To follow the same methods in a democracy as were deemed necessary in Czarist Russia violates, according to the very books quoted by the respondent, the most fundamental precepts of Marxism-Leninism. [R. 10192-3; App. Item 47 pp. 205-6, Ex. 608, R. 483, Ex. 28, R. 1362, 2724; Ex. 12; R. 4143-4; App. Item 48

---

[12]Any contention that the outlines were contrived is inconsistent with the Government's position that persons were expelled because of the "iron discipline" of the Party. They were expelled because they took a position opposed to that set forth in the outlines. The expulsions are a reflection of genuine policy; it follows that the outlines are also.

[13]At page 31 the Government places its reliance on the fact that outline deals with a revolutionary movement, ignoring both the statement in the outline that this refers to fundamental change, not force and violence, and an instruction to this effect given to the jury (Instr. 145, App. Item 28, p. 56).

[14]As has been noted above, the outlines indicated that in the United States the correct application of theory called for the winning of majority support to achieve social change through democratic processes.

pp. 206-207; R. 2982-4; App. Item 49 pp. 207-208, R. 2646, Ex. 147, R. 1126, Ex. 29, R. 2618; Ex. JO, R. 10386-97; App. Item 50 pp. 208-211; R. 2602, 2630, 2636, 2639-47; App. Item 51, pp. 211-17; R. 10276, 10417-19; App. Item 52 pp. 217-19, R. 10432-3; App. Item 53 pp. 219-21, R. 10332-5; App. Item 54, pp. 221-4]. The respondent insists that the program outlined for Czarist Russia in books studied in Communist Party classes must be deemed that of the Communist Party in the United States, despite the clear statement in the outlines and resolutions of the Communist Party of the United States of an entirely different program predicated upon the proposition that a current Marxist-Leninist program varies with time, place, and circumstances.

It also appears from the record that even among Communists there were sharp differences in the interpretation of Marxist-Leninist principles.[15] That statements made in Party classes did not necessarily reflect the views of the leadership of the Party or of any of the petitioners is clear. [R. 4732-4, App. Item 39, pp. 175-6; R. 4823-5, App. Item 40, pp. 176-7; R. 4426, R. 6766-67, Ex. 468; R. 6775-77; R. 4155, R. 4824, App. Item 40, pp. 176-7; R. 4914-15, App. Item 41, pp. 177-8.] The respondent's own witnesses testified that as teachers they received no instructions from the leadership of the Communist Party but merely utilized the outlines as they saw fit [R. 562-3, App. Item 43, p. 184.] With respect to most of the petitioners, no connection is established to any outline or

---

[15] *Cf. Schneiderman v. United States*, 320 U. S. 118, 148, "With commendable candor the Government admits the presence of sharply conflicting views on the issue of force and violence as a Party principle, and it also concedes that "some Communist literature in respect of force and violence is susceptible of an interpretation more rhetorical than literal."

to any class; what is attributed to them is what was allegedly said in some classes and not what appears in the outlines.

At page 36 of the respondent's Brief is cited an instance in which a member of a class allegedly stated that a majority was not necessary in order to accomplish a revolution, that is, a change from capitalism to socialism. Completely ignored is the undisputed fact that the member of the class was expressing his own personal beliefs and not the position of the Communist Party [R. 1948-9, 1957-59, App. Item 45, pp. 186-88]. Thus defendants are held responsible not only for what took place in the classes at which they were not present and over which it was not shown that they exercised any control, but the Government imputes to them statements made during those classes which *admittedly* did not even represent the position of the Communist Party.

(l) Evidence admitted for limited purposes is treated as though it were to be considered without any limitation. Thus, for example, at page 35 of the brief (FW 20) evidence as to what petitioner Stack was allegedly taught in Moscow in 1932 is referred to as proof of the conspiracy, although the evidence was admitted only on the issue of that petitioner's intent or knowledge (Supp. App. Item 2, p. 4). The same use of limited testimony was made with respect to the 1934 waterfront strike testimony (p. 38 including footnote 21) which was offered by the prosecution and received as against Schneiderman only (Supp. App. Item 3, p. 5).

(m) The respondent's process of tarring every idea expressed by the Communist Party with an evil motive is well illustrated by its treatment of outline references to the "American Revolution of 1776, French Revolu-

tion, Russian Revolution in 1917" (p. 40). The respondent's position is that because force and violence was involved in all of these revolutions, it must be inferred that by discussing them, the Communist Party was thereby advocating a violent revolution to achieve socialism—even though democratic processes through which the majority could achieve their wishes are available. Certainly a substantial question is raised as to the invasion of First Amendment rights by a theory which renders discussion of the American Revolution dangerous. At the same time the respondent points to quotations from the Declaration of Independence and from Lincoln and Jefferson regarding the "right of revolution" (converted by the Government to the "right of violent revolution") as further evidence of the conspiracy. When the Government takes such a position it is not difficult to explain the fear of American citizens to reaffirm the Declaration of Independence.

In summation, the repeated assertions that petitioners jointly and collectively directed the California Party, its classes and study groups and other activities is in no way supported by the record. Evidence of any joint action among *all* of the petitioners is completely lacking; evidence of joint action among *any* of the petitioners is almost totally absent, and where present involves a few of the petitioners in each instance, the group changing from occasion to occasion, and relates to activity unconnected with the forbidden advocacy. The "overt acts" alleged and proved are examples of this; they involve several of the petitioners speaking at the same meeting on subjects fully within the protection of the First Amendment. As for schools and relationship to any outlines used in the schools there is not one word of evi-

dence involving petitioners Healey, Dobbs, Fox, Kusnitz, Lambert, Lima and Steinberg. As to the remaining four petitioners here, the evidence establishes no joint action at all among them and no individual action in any way indicating their agreement to utilize the schools or classes for the purpose of engaging in the outlawed advocacy.[16] As for the quotations from the books relied on by the Government, as to most petitioners there is no evidence that they ever read them let alone adopted them as applicable to the United States. Yet it is precisely out of the schools and quotations that the cloth of this conspiracy is fabricated by the Government.

The Government, in order to establish the claimed proof of guilt relies on quotations from books and third party declarations to establish every element of the offense, including each petitioners connection with the conspiracy charged and specific intent. Whether such proof may be substituted for proof of personal conduct is a question which the Government avoids but which this Court should decide.

5. Reply on the Question of "Overt Acts" (Pet. pp. 15-16, 76-78; Resp. Br. pp. 50-51).

Respondent does not discuss the failure of the trial court to instruct on the question of "overt acts" as requested by petitioners (Pet. Br. pp. 15-16), for the first time presenting to this Court the question of the construction of the "overt acts" provisions of the general conspiracy

---

[16]In the *Dennis* case, it was admitted that "what is taught in our schools is determined" by the National Committee of which each defendant was a member. Here not only is such evidence lacking, but there is undisputed evidence showing that there was no such controls.

statute as applied to a Smith Act prosecution (Pet. Br. p. 76).

Respondent concedes that neither of the two "overt acts" upon which the prosecution solely relies "involved any advocacy or teaching of political violence" (Resp. Br. p. 50), but respondent avers that in a prosecution for conspiracy the overt act alleged and proved need not be itself a crime (Resp. Br. p. 51). Plainly, that is not the issue here. Where a charge is made that the accused conspired to advocate and teach the forcible overthrow of the Government and to use the Communist Party for such object, can the case be submitted to the jury when concededly the only proof of "overt acts" is attendance by the accused at a lawful public meeting held under the auspices of the Communist Party? Respondent has not addressed itself to this significant question (Pet. Br. pp. 76-8).

Respondent concedes that the overt act "must be pursuant to or in furtherance of the conspiracy," but it avers that "this condition was satisfied here by the leading roles played by Steinberg and Schneiderman at public meetings admittedly designed to strengthen the Communist Party" (Resp. Br. p. 51). By this statement, respondent reveals the vice of treating speech or assembly as the equivalent of overt acts of a seditious character. Petitioners were not charged here with a conspiracy "to strengthen the Communist Party". The trial court specifically instructed the jury that the indictment charged petitioners with conspiracy to organize the Party "as a means or vehicle to advocate and teach the necessity and the duty of overthrowing and destroying the Government of the United States by force and violence as speedily as circumstances would permit." (106 F. Supp. 906,

935.) The overt acts charged did not in any manner relate to the use of the Communist Party for this purpose. Under the Constitution, under the decisions of this Court, and as a matter of law, the jury could not properly find that attendance at a lawful public meeting of the Communist Party was an act in furtherance of the conspiracy alleged on this indictment (Pet. Br. pp. 76-8). It is for this Court to decide whether the general conspiracy statute can constitutionally be used to turn speech and assembly into seditious conduct.

6. Reply on the Question of the F.B.I. Report and Motion for Mistrial (Pet. pp. 16-18, 79-83; Resp. Br. pp. 68-72.)

Respondent seeks to shift the onus of the publication of the Report from the Department of Justice to the Senate Committee (Resp. Br. p. 69). The facts show that the chairman of the committee requested the "documentary proof which I could cause to be published" on June 21, 1952 (App. Item 78, p. 302). On June 25, 1952, the Department responded stating that there "will be no objection to your committee issuing this compilation" (*supra*, pp. 302-3). It was known by the Department that the Report would be issued for "general distribution" (*supra*, pp. 302-3). No request was made by the Department that issuance of the Report be foregone until the conclusion of the trial. That such a highly sensational Report would receive extended publicity, considering its author and sponsorship, cannot be denied. That the publication of the Report was potentially harmful was conceded by the courts below (Pet. Br. p. 81).

The trial court stated: "There will be only one question" [R. 13714]. The compound question was whether

the jury had read the publicity and if they felt that they could not with an open mind decide the case solely on the evidence. "Then we take their word for it, whatever it is" [R. 13714]. Thus, the trial court was adamant against any searching interrogation. An answer of "yes" or "no" to the single compound question would have been meaningless. It is plain that it was not petitioners who were "fencing" (Resp. Br. p. 70). It should be noted that the trial court declined to give a specific instruction to disregard the publicity (Pet. Br. p. 18), and after verdict, the District Court ordered no interrogation of any juror, upon pain of contempt [R 14008].

Under the circumstances of the case herein (Pet. Br. pp. 16-18, 79-83), the publication of the Report was presumptively prejudicial, and the burden rested heavily upon the respondent to establish the harmlessness of its conduct. The courts below relieved respondent of this burden and even effectively foreclosed any attempt by petitioners to themselves assume the burden, if it was theirs. Respondent, in its citation of decisions, appears to have overlooked the recent decision of this Court in *Remmer v. United States*, 347 U. S. 227.

Contrary to respondent's belief, petitioners do not contend that "all of the organs of Government" were required to become silent during their trial (Resp. Br. p. 71). But when prosecuting officials issue a "long secret F.B.I. Report" for publication at the most crucial time in a criminal trial on some of the precise issues upon which the accused is being tried, and which cannot fail to obtain full publicity, then decent standards of procedure require not only a searching interrogation of the jurors by court and counsel, but a new trial unless the prosecution can establish overwhelmingly by proof that

no prejudice was done to the accused. "Justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U. S. 11, 14.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

NORMAN LEONARD,
BEN MARGOLIS,
ALEXANDER H. SCHULLMAN,
A. L. WIRIN,
Attorneys for Petitioners.

LEO BRANTON, JR.,
Of Counsel.